(1)

Supreme Court, U.S.
FILED

No. 04 742 NOV 29 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN DOE,
On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

PAUL Y. KIYONAGA
DEBRA L. SOLTIS

KIYONAGA & SOLTIS, P.C.
910 17th Street, N.W.
Washington, D.C. 20006
(202) 363-2776

* Counsel of Record

BRENDAN V. SULLIVAN, JR.
JOHN G. KESTER *
ROBERT A. VAN KIRK
DANIEL D. WILLIAMS

WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. The Federal Employees Pay Act, 5 U.S.C. § 5542(a) (FEPA), mandates without limitation that employees "shall be paid for" overtime work "officially ordered or approved." It makes no exception for attorneys or other professionals. Do this Court's estoppel decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *OPM* v. *Richmond*, 496 U.S. 414 (1990), permit the Department of Justice, simply by refusing to put detailed prior orders or approvals of overtime work in writing, to nullify that statutory command and exclude its attorneys as "professionals" from FEPA's overtime pay requirement?

2. Does *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), require deference to the Department of Justice's interpretation of an OPM administrative regulation to curtail FEPA's overtime compensation mandate, when the Department of Justice's position is contrary to its own and prior judicial interpretations of the OPM regulation?

LIST OF PARTIES

Appellant in the Court of Appeals, respondent here, was the United States. Appellees in the Court of Appeals, petitioners here, were representatives of a certified opt-in class of more than 9000 current and former employees of the United States Department of Justice. The party identified in the caption as John Doe is Daniel S. Jacobs. He is one of 186 class representatives, thirty of whom proceeded under pseudonyms. See *Doe* v. *United States*, 44 Fed. Appx. 499 (Fed. Cir. 2002).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES, ORDERS AND REGULATIONS INVOLVED	1
STATEMENT	1
A. The Statute's Pay Requirement.	2
B. The Department of Justice Refuses To Pay Attorneys for Overtime Work	2
C. The Department of Justice Officially Orders and Approves Overtime Work.	4
1. Orders.	4
2. Approvals	6
D. The Department Has Recognized, But Defied, FEPA's Requirement To Pay Attorneys for Overtime Work.	7
E. The Trial Court's Summary Judgment.	10
F. The Federal Circuit's Reversal.	11
REASONS FOR GRANTING THE WRIT	13
I. THIS COURT'S HOLDINGS IN *SCHWEIKER* AND *RICHMOND* DO NOT AUTHORIZE AN EXECUTIVE DEPARTMENT TO NULLIFY A PAY STATUTE ENACTED BY CONGRESS.	15

TABLE OF CONTENTS—Continued

	Page
A. *Schweiker* and *Richmond* Do Not Permit Agencies To Escape FEPA by Noncompliance With Regulations.	16
B. The Decision Conflicts With the Interpretation of *Schweiker* and *Richmond* in Four Other Circuits.	17
II. THE FEDERAL CIRCUIT'S *CHEVRON* DEFERENCE IS CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.	18
A. *Chevron* Does Not Permit Nullification of FEPA's Statutory Pay Obligations.	18
B. FEPA and the OPM Regulation Are Not Ambiguous and Had a Settled Interpretation	21
1. FEPA Is Not Ambiguous.	21
2. An Agency Interpretation in Conflict With Court Interpretations Does Not Receive Deference.	22
3. An Agency's Rejection of Its Prior Interpretations Undermines Deference.	24
C. Deference Is Not Owed to an Agency's Interpretation of a Statute Is Not Authorized To Administer, or of Another Agency's Regulation.	26
III. THE FEDERAL CIRCUIT'S DECISION HAS GOVERNMENT-WIDE IMPACT	28
CONCLUSION	30

TABLE OF CONTENTS—Continued

Page

APPENDIX

A. Opinion of the Court of Appeals (June 23, 2004) 1a

B. Order of the Court of Appeals denying rehearing and rehearing *en banc* (September 1, 2004) 29a

C. Order of the Court of Appeals granting permission to appeal (April 2, 2003) 30a

D. Opinion of the Court of Federal Claims (November 14, 2002) 33a

E. Order of the Court of Federal Claims (January 17, 2003) 64a

F. Statutes, Orders and Regulations 65a

G. Excerpts From Record 78a

1. Memorandum, Executive Office for United States Attorneys (November 22, 1977) 78a

2. Opinion, Office of Legal Counsel (April 21, 1980) 79a

3. Memorandum, U.S. Attorney, District of South Carolina (August 2, 1982) 86a

4. Memorandum, Office of Legal Counsel (February 2, 1984) 88a

5. *United States Attorneys' Manual* (July 1, 1992, ed.) 89a

6. Executive Office for United States Attorneys, United States Attorneys' Ranking by Overtime, FY 1993 ..... 91a

TABLE OF CONTENTS—Continued

	Page
7. Policy and Procedures Manual, District of Rhode Island (October 15, 1993)	94a
8. Letter, Assistant Attorney General, Civil Division (December 15, 1994)	95a
9. Letter, Assistant Attorney General, Environment and Natural Resources Division (November 20, 1995)	96a
10. Memorandum for Attorney General From Assistant Attorney General for Administration (March 12, 1996)	98a
11. Executive Office for United States Attorneys, The USA-5 and USA-5A: Overview of the United States Attorneys' Monthly Resource Summary Report (April 2, 1996)	106a
12. Remarks of Attorney General (April 17, 1996)	110a
13. Memorandum, Assistant Attorney General, Antitrust Division (December 17, 1996)	113a
14. Environment and Natural Resources Division, Attorney Timekeeping System (March 18, 1998)	115a
15. Attorney General's Talking Points, Awards Ceremony (April 8, 1997)	117a
16. Memorandum for U.S. Attorney, Eastern District of Louisiana (March 27, 1998)	119a
17. Memorandum of Deputy Associate Attorney General (November 9, 1998)	120a
18. Memorandum, Executive Office for United States Attorneys, Average Attorney Work Week (June 14, 1999)	121a

TABLE OF AUTHORITIES

Cases: Page

Adams v. *United States*, 162 Ct. Cl. 766 (1963).... 23
Anderson v. *United States*, 136 Ct. Cl. 365 (1956).....11, 23-25, 29
Anderson v. *United States*, 201 Ct. Cl. 660 (1973)..... 20, 23
BATF v. *FLRA*, 464 U.S. 89 (1983) 19
Barnhart v. *Thomas*, 540 U.S. 20 (2003) 26
Bates v. *United States*, 522 U.S. 23 (1997) 22
Baylor v. *United States*, 198 Ct. Cl. 331 (1972).... 22, 23
Bennett v. *United States*, 4 Cl. Ct. 330 (1984) 23
Boulez v. *Commissioner*, 810 F.2d 209 (D.C. Cir.), *cert. denied*, 484 U.S. 896 (1987). 17
Bowen v. *Georgetown University Hosp.*, 488 U.S. 204 (1988) 25
Brown v. *Gardner*, 513 U.S. 115 (1994)..... 21
Buckley v. *United States*, 51 Fed. Cl. 174 (2001).. 23
Byrnes v. *United States*, 163 Ct. Cl. 167 (1963) ... 23, 24
California Independent System Operator Corp. v. *FERC*, 372 F.3d 395 (D.C. Cir. 2004)..... 22
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)...12-15, 18 19, 23, 26-28
Christensen v. *Harris County*, 529 U.S. 576 (2000)..... 21
Clinton v. *City of New York*, 524 U.S. 417 (1998)..... 20
Crowley v. *United States*, 53 Fed. Cl. 737 (2002). 23
DeCosta v. *United States*, 22 Cl. Ct. 165 (1990)... 23
DeGeorge v. *United States Dist. Court*, 219 F.3d 930 (9th Cir. 2000) 22
Doe v. *Tenet*, 329 F.3d 1135 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2908 (2004)..... 18
Estate of Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992) 25

TABLE OF AUTHORITIES—Continued

	Page
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)	19, 26
FDIC v. *Ernst & Young LLP*, 374 F.3d 579 (7th Cir. 2004)	18
FEC v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981)	19
Fix v. *United States*, 368 F.2d 609 (Ct. Cl. 1966)	23
Flick v. *Liberty Mut. Fire Ins. Co.*, 205 F.3d 386 (9th Cir.), *cert. denied*, 531 U.S. 927 (2000)	18
Franconia Associates v. *United States*, 536 U.S. 129 (2002)	29
Hannon v. *United States*, 29 Fed. Cl. 142 (1993)	23
Heckler v. *Community Health Services*, 467 U.S. 51 (1984)	17
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	19, 25
Jackson v. *Culinary School of Washington, Ltd.*, 27 F.3d 573 (D.C. Cir. 1994), *vacated and remanded*, 515 U.S. 1139 (1995)	18
Johnson v. *Guhl*, 357 F.3d 403 (3d Cir. 2004)	18
Keene Corp. v. *United States*, 508 U.S. 200 (1993)	22
Lechmere, Inc. v. *NLRB*, 502 U.S. 527 (1992)	24
Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)	18
Lyng v. *Payne*, 476 U.S. 926 (1986)	16
MCI Telecommunications Corp. v. *American Tel. & Tel. Co.*, 512 U.S. 218 (1994)	20
Maislin Industries, U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	24
Manning v. *United States*, 10 Cl. Ct. 651 (1986)	21, 23
Martin v. *OSHRC*, 499 U.S. 144 (1991)	26
Meyer v. *Holley*, 537 U.S. 280 (2003)	26

TABLE OF AUTHORITIES—Continued

Page

Moore v. *Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir.), *cert. denied*, 540 U.S. 938 (2003) 22
Morton v. *Ruiz*, 415 U.S. 199 (1974) 25
Muscarello v. *United States*, 524 U.S. 125 (1998) ... 21
National R.R. Passenger Corp. v. *Morgan*, 536 U.S. 101 (2002) 18
Navarro v. *Pfizer Corp.*, 261 F.3d 90 (1st Cir. 2001) 27
Neal v. *United States*, 516 U.S. 284 (1996) 24
OPM v. *Richmond*, 496 U.S. 414 (1990) ... 11, 12, 14, 16-18
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) 26
Pension Benefit Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 26
Professional Airways Systems Specialists v. *FLRA*, 809 F.2d 855 (D.C. Cir. 1987) 26
Ragsdale v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) 19
Rapp v. *United States*, 340 F.2d 635 (Ct. Cl. 1964) 23
SEC v. *Sloan*, 436 U.S. 103 (1978) 19
Schweiker v. *Hansen*, 450 U.S. 785 (1981) 11, 12, 14, 16-18
Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 21, 26
Social Security Admin. v. *FLRA*, 201 F.3d 465 (D.C. Cir. 2000) 27
USPS v. *Gregory*, 534 U.S. 1 (2001) 29
United States v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) 29
United States v. *Hatter*, 532 U.S. 557 (2001) 29
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 15, 27, 29

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Myers*, 320 U.S. 561 (1944)	29
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003)	29
Watt v. *Alaska*, 451 U.S. 259 (1981)	25
Whitman v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001)	20
Statutes:	
Consolidated Appropriations Act, 2000, 113 Stat. 1501 (1999)	30
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, 114 Stat. 2762 (2000)	30
Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-219	20
Fair Labor Standards Act Amendments of 1974, 88 Stat. 55 (1974)	20
Federal Employees Pay Act, 59 Stat. 295, as amended, 5 U.S.C. §§ 5541-5550a	1, *passim*
Tucker Act, 28 U.S.C. § 1491	1, 16, 29
5 U.S.C. § 5542	1, *passim*
5 U.S.C. § 5543	2, 30
5 U.S.C. § 5545	2, 4
5 U.S.C. § 5547	2
5 U.S.C. § 5548	15, 20, 27
5 U.S.C. § 6101	2
28 U.S.C. § 1254	1
28 U.S.C. § 1292	11
28 U.S.C. § 1295	19
29 U.S.C. § 203	20
29 U.S.C. § 213	20

TABLE OF AUTHORITIES—Continued

Regulations: Page

5 C.F.R. § 550.102 20
5 C.F.R. § 550.111 ..... 1, 11
5 C.F.R. § 551.203 20
5 C.F.R. § 551.205 20
5 C.F.R. § 551.206 20
5 C.F.R. § 551.207 20
28 C.F.R. § 0.22 3
28 C.F.R. § 0.76 ..... 3, 5

Orders:

Department of Justice Order 1551.3 (Nov. 15, 1971) 1, 3, 5, 8, 9
Department of Justice Order 1551.4A (Aug. 1, 1975) 4
Department of Justice Order 1200.1 (Aug. 25, 1998) 1, 5

Miscellaneous:

Defendant's Brief, *Bilello* v. *United States*, No. 198-63, Ct. Cl. (1965) 24
Defendant's Post-Trial Brief, *Bowman* v. *United States*, Nos. 393-82C, etc., Cl. Ct. (1984) 25
Defendant's Post-Trial Brief, *Hannon* v. *United States*, No. 91-1334C, Ct. Fed. Claims (2001) .. 8
J. HELLER, CATCH-22, A NOVEL (1961) 19
UNITED STATES DEPARTMENT OF JUSTICE, LEGAL ACTIVITIES 1993-1994 (1994) 29

PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered June 23, 2004.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 372 F.3d 1347 and is reproduced at A. 1a.[1] Its order denying rehearing and rehearing *en banc* is unreported and is reproduced at A. 29a. Its order granting permission to appeal is reported at 67 Fed. Appx. 596 and is reproduced at A. 30a. The opinion of the Court of Federal Claims is reported at 54 Fed. Cl. 404 and is reproduced at A. 33a.

JURISDICTION

The judgment of the Court of Appeals was entered June 23, 2004. A. 1a. Its order denying a timely petition for rehearing and rehearing *en banc* was entered September 1, 2004. A. 29a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDERS AND REGULATIONS INVOLVED

Pertinent sections of the Federal Employees Pay Act (FEPA), 5 U.S.C. §§ 5541-5550a, Department of Justice Orders 1551.3 (1971) and 1200.1 (1998), and OPM regulation 5 C.F.R. § 550.111 are reproduced at A. 65a.

STATEMENT

This is an action under the Tucker Act, 28 U.S.C. § 1491, brought in the United States Court of Federal Claims by a certified class of over 9000 attorneys employed by the U.S. Department of Justice (DOJ), claiming compensation due

[1] Citations to "A." are to the appendix hereto, and to "C." to the Joint Appendix filed in the Court of Appeals.

them under FEPA for overtime work "officially ordered or approved."

A. The Statute's Pay Requirement.

The Federal Employees Pay Act (FEPA), 59 Stat. 295, as amended, 5 U.S.C. §§ 5541-5550a, enacted in 1945, mandates for federal employees that "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for" at prescribed rates. 5 U.S.C. § 5542(a). No exception is made for government attorneys or other professional employees. Unlike private employers, who typically pay professional employees flat salaries and require that they perform their jobs without respect to hours worked, Congress has enacted a pay plan for its professionals that treats them as hourly workers—holding them accountable to work a minimum of 40 hours each week, 5 U.S.C. § 6101, and then in FEPA providing for either limited amounts of overtime pay or compensatory time off for hours exceeding the required 40.[2]

B. The Department of Justice Refuses To Pay Attorneys for Overtime Work.

The government conceded that FEPA makes no exceptions for professional employees, and that attorneys employed by the Department of Justice "plainly are" covered by FEPA. Brief for Appellant, Ct. Apps., 44. Yet year after year the Department of Justice as a matter of formal policy and practice, approved at the highest levels, including personally by the Attorney General, refused to pay its attorneys for overtime

---

[2] FEPA provides that overtime work may be compensated in any of several ways: (1) payment in cash subject to statutory caps, see 5 U.S.C. §§ 5542(a), 5547; (2) compensatory time off, 5 U.S.C. § 5543; or (3) a limited fixed amount of additional salary, 5 U.S.C. § 5545(c)(2).

work it required them to perform. The Department sought to explain that refusal by describing its attorneys as "professionals." *E.g.*, A. 78a, 89a. The Assistant Attorney General for Administration, whose duties included administering overtime work throughout the Department, 28 C.F.R. § 0.76(f), testified that although overtime work was required, attorneys "were not authorized to be paid overtime," and "we didn't pay attorneys overtime." C. 491-92.

A Departmental Order that was in effect from 1971 until August 1998 stated that "[i]t is the general policy of the Department not to order overtime for attorney personnel," and that authorizations of overtime work "shall be in writing." DOJ Order 1551.3, §§ 8.a.(1), 8.b.(2) (Nov. 15, 1971), A. 72a. That Order did not mean, however, that attorneys were not required to work overtime. A 1977 memorandum to United States Attorneys confirmed that, based on the 1971 Order, "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours of duty without overtime pay or compensatory leave." A. 78a. The *United States Attorneys' Manual*, authorized by the Attorney General, and announcing for all DOJ attorneys "the policy for the Department of Justice," C. 544, 28 C.F.R. § 0.22(b), provided that

> "U.S. Attorneys are *not* authorized to approve overtime for attorney personnel. *Assistant U.S. Attorneys are professionals and should expect to work in excess of regular hours without overtime pay.*"

Manual, § 3-2550.A (1992 ed.) (first emphasis in original), A. 89a.

Although insisting that its employees as "professionals" were expected to work overtime without compensation, the Department has refused to allow its attorneys discretion to work fewer than eight hours on a given day or when they choose. Thus, for example, a DOJ "professional" attorney has no authority to go home early on a Friday without taking

leave, no matter how many hours he or she has already worked that week. See, *e.g.*, C. 902-03 (any attorney working fewer than eight hours during a day must submit leave slip), 882 (must take leave if absent more than 15 minutes), 1000-04 (attorney chastised for AWOL for leaving 45 minutes early on Friday). DOJ also has declined to make use of a provision of FEPA that limits potential overtime liability by authorizing agencies to provide a flat-rate salary premium, capped at 25%, for employees like attorneys whose duties require them frequently to work significant amounts of unscheduled overtime. See 5 U.S.C. § 5545(c)(2); C. 88-91; DOJ Order 1551.4A, Aug. 1, 1975.

Published directives to DOJ attorneys throughout the country, implementing the Departmental orders, reiterated that attorneys were expected to work overtime without compensation. *E.g.*, C. 1006 (D. Wyo.: *United States Attorneys' Manual* "prohibits overtime pay or compensatory time off for attorney personnel"); pp. 5, 9-10, *infra*. By contrast, support staff, including even other professionals who worked overtime alongside attorneys on the same matters, received overtime pay. *E.g.*, C. 950 (W.D. Va.: although "Manual specifically prohibits overtime pay or compensatory time off for attorney personnel, support personnel may be entitled to overtime pay or compensatory time"), 1025 (D. Mont.: same), 1126 (S.D.W. Va.: same).

C. The Department of Justice Officially Orders and Approves Overtime Work.

It was undisputed that in a variety of publications and statements, the Department of Justice told its attorneys that they were expected as part of their assigned duties to work overtime, or approved their doing so. Among many examples in the record:

1. *Orders.*

— The Assistant Attorney General for Administration testified that DOJ attorneys routinely as a matter of policy

were required to perform overtime work, A. 2a-3a, C. 538-40, that they were "expected to work extra hours," and that they were "frequently required by their workloads to work outside normal business hours." C. 555, 561.[3]

— The Department's *United States Attorneys' Manual* stated that attorneys "are professionals and should expect to work in excess of regular hours." A. 89a.

— A stream of implementing orders and directives throughout the Department similarly informed attorneys that, based on the 1971 Department of Justice Order and the *Manual*, unpaid overtime work was "required," *e.g.*, A. 86a, 113a, C. 1025, 1256, 1341, a "requirement," A. 94a. See also C. 934a (attorneys "are expected to spend such additional time as is necessary"), 915 ("Attorneys are presumed . . . to work the number of uncompensated hours in addition to the standard 40 hour workweek needed to successfully accomplish their work."), 989 ("must be ready and willing to work . . . around the clock if necessary").

— The Attorney General's office instructed its attorneys that "[w]e all know that you will be spending many more hours than stated . . . ." C. 1075. The Attorney General's Advocacy Institute stated in its curriculum "that no new attorney should expect to work as little as a 9 to 5 schedule, 5 days per week." C. 1289.

---

[3] Throughout most of the relevant period, authority to order or approve overtime work was delegated by the Attorney General to the Assistant Attorney General for Administration and by him to, *inter al.*, the Assistant Attorneys General and the Director of the Executive Office for United States Attorneys (EOUSA). Department of Justice Order 1551.3, §§ 6, 7 (1971), A. 71a-72a; see also 28 C.F.R. § 0.76. In August 1998 a superseding order removed the delegations to the Director of EOUSA or any Assistant Attorneys General except the Assistant Attorney General for Administration. Department of Justice Order 1200.1 (1998), A. 73a.

— The requirement to work overtime was transmitted in recruiting, orientations, training, and an array of other instructions by supervisors throughout the Department. *E.g.*, C. 1232 ("I was informed . . . that the work could not possibly be accomplished during a 40-hour work week"), A. 119a ("importance of working and recording overtime").

— Attorneys were urged by supervisors to work more overtime. *E.g.*, A. 56a n.11 ("a constant focus of the front office"), C. 1196 ("a constant agenda item"), 238 (told to "jack up our overtime"), 883 ("AUSAs who are working less tha[n] 48 hours per week, on an average, are viewed as underemployed by the Department of Justice"), 898 (attorneys working only 40 hours per week ordered to take "some additional assignments").

2. *Approvals.*

— The Department required that each attorney precisely record and submit his or her overtime hours. It explained that these overtime reports were essential "in order to measure *the true effort required* to carry out the United States Attorneys' mission." A. 107a (emphasis supplied).

— Compilations of overtime from each office were sent monthly for ranking by the Executive Office for United States Attorneys (EOUSA), which then submitted that information to the Department's top officials. See, *e.g.*, A. 91a-93a (districts ranked for FY 1993 averaged 5.44 to 13.94 hours of overtime weekly per attorney); A. 121a-124a (districts ranked for FY 1999 averaged 45.14 to 52.54 hours weekly per attorney).

— United States Attorneys competed to have their attorneys achieve the highest levels of overtime. *E.g.*, A. 119a, C. 881, 884, 1130a, 1285, 1130j ("Congratulations—we have moved up the ladder and are now ranked 35th out of the 94 United States Attorneys Offices with a total average work week of 49.43 hours."). An EOUSA official confirmed that

"[t]he purpose of circulating these rankings, obviously, was to encourage competition among the offices." C. 1285.

— Overtime work of attorneys was cited in evaluations, commendations, promotions and awards rewarding high overtime. A. 55a, 95a, 96a, C. 1335-36 (bonus citing "60 to 70 hour work weeks"), 1348 (bonus citing overtime), 1310 (promotion based on overtime). Attorneys were advised that "special weight" would be given to overtime "in the attorney performance ratings." A. 87a. The Attorney General personally made awards to attorneys commending "the late nights and weekends" they had worked, A. 111a, and recognizing that "[y]ou have spent many long days and many late nights serving the Justice Department and the American people." A. 117a.

— Conversely, attorneys who did not perform substantial overtime work were given additional assignments, denied promotion, or reprimanded. C. 933, 993-94, 1233, 1272, 1322.

— Assistant Attorneys General (with delegated authority to approve overtime) submitted attorney overtime hours to courts, in order to obtain reimbursement from private litigants under fee-shifting statutes. Such payments for attorney overtime were a significant source of funds used by the Department. See, *e.g.*, A. 96a, 115a, C. 381, 1050-52 (Environment and Natural Resources Division), 955 (Tax Division).

D. The Department Has Recognized, But Defied, FEPA's Requirement To Pay Attorneys for Overtime Work.

For decades and as recently as 2001, while the present case was pending, the government conceded in the Court of Federal Claims that under FEPA

> "a directive, rule, or regulation issued by an authorized official that *de facto* establishes or authorizes a work day or work week in excess of eight hours in a day or

> 40 hours a week is sufficient to comprise order or approval."[4]

In fact, the government initially made that same concession in exactly the same words in this case. Defendant's Motion for Summary Judgment 23 (July 14, 2000). See also pp. 24-25, *infra*.

In addition, the Department's own internal legal analyses agreed that FEPA required payment for the overtime work of the Department's attorneys. Among examples:

1. In 1980 the Department's Office of Legal Counsel opined: "[i]t is our conclusion that [Department of Justice] attorneys, other than members of the Senior Executive Service, are entitled to overtime or compensatory overtime" if FEPA's conditions were satisfied, which it concluded they were. A. 79a, 85a. The opinion explained that

> "The traditional denial by the Department of Justice of overtime compensation to its attorneys does not rest on statutory grounds. It rests on an internal regulation, now to be found in § 8(a)(1) of Order No. 1551.3 of November 15, 1971, which states that 'it is the general policy of the Department not to *order* overtime for attorney personnel' (Emphasis added.)"

A. 81a (emphasis in original). It added that

> "We believe that § 8(a)(1) of Order No. 1551.3 should be reexamined not only in light of the policy issue whether attorneys should be given compensation for overtime as a matter of grace, but also whether the order accords with the statutory purpose of § 5542 . . . ."

A. 82a. The opinion concluded by questioning, A. 85a,

> "whether the Department of Justice should keep in effect an order, which, according to the Court of Claims, is (a) inconsistent with the statutory mandate, and (b) not

---

[4] Defendant's Post-Trial Brief, *Hannon* v. *United States*, No. 91-1334C, Ct. Fed. Claims, 127 (2001).

> likely to protect the United States in litigation brought by attorneys for overtime 'induced' by their superiors."

2. In 1984 the Deputy Attorney General's Office of Attorney Personnel Management concluded:

> "As a matter of law, DOJ attorneys are entitled to premium pay or compensatory time on the same basis as other DOJ employees."

C. 445. It noted that "[a]lthough 5 U.S.C. § 5542(a) refers to 'hours of work officially ordered or approved in excess of 40 hours in an administrative workweek,' DOJ Order 1551.3 does not address overtime work 'approved' by a supervisor." C. 440. It characterized refusal to pay attorneys for the overtime the duties of their job required and DOJ officials approved as "unwise at best and unlawful at worst." C. 441.

3. A Civil Division opinion likewise concluded that "[i]n sum, an attorney employed by the Civil Division is entitled to overtime pay . . . ." C. 432.

4. In 1996 the Assistant Attorney General for Administration reported to the Attorney General on the basis of a study by a special panel on overtime pay warning of "potential liability for overtime pay" and "potential embarrassment to the Department as the chief enforcer of Federal law, including overtime statutes." A. 103a.

5. The Attorney General, however, decided instead to continue the existing policy of nonpayment for attorney overtime, and to ask Congress to amend FEPA to exclude DOJ attorneys from the overtime pay requirement and enact a different pay system. A. 105a. The Office of Management and Budget declined, however, C. 1370, and the Department's refusal to pay attorneys under FEPA for overtime work remained unchanged.

6. In 1998 the Deputy Associate Attorney General warned the Associate Attorney General that

> "it is problematic (some might use the term unconscionable) for the Department to continue to not pay its

> attorneys overtime knowing full well that the overtime statute applies."

A. 120a. Later that year this action was filed.

E. The Trial Court's Summary Judgment.

On cross-motions the Court of Federal Claims entered summary judgment on liability for petitioners. The court explained that

> "agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime."

A. 60a. Noting that "[t]he parties agree that the facts . . . are not in dispute," A. 38a, the court held that those undisputed facts established that "[t]he Department of Justice has 'ordered or approved' overtime for members of the Class, for purposes of the Federal Employees Pay Act." A. 35a.

> "[T]he Department of Justice informed attorneys that it *expected them to work overtime* when necessary. Authorized department officials testified that *they understood the job to require overtime work.* The Department's Manual states that attorneys *should expect to work in excess of regular hours*."

A. 58a (emphasis supplied). The record established without dispute, the court held, that DOJ attorneys

> "*are required to complete their assignments however long they may take.* . . . The Department of Justice makes it clear that it expects attorneys to finish their job, and the attorneys know it."

A. 57a-58a (footnotes omitted; emphasis supplied). The court noted "management's understanding and approval of the process," *id.*, and that

> "The Department recognizes that it could not function properly within its budget constraints without officially induced and approved overtime work by government attorneys."

A. 35a. On the government's motion, the court certified its ruling on liability for immediate appeal under 28 U.S.C. § 1292(d)(2). A. 64a. The government urged the Court of Appeals that "the importance of the question cannot be exaggerated." Petition of United States, Ct. Apps., at 8.

F. The Federal Circuit's Reversal.

The Federal Circuit granted the government's petition, A. 30a, and reversed, A. 1a. The court noted that "[t]he government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation." A. 27a. Nevertheless, the Federal Circuit held that the overtime performed by DOJ attorneys "was not officially ordered or approved in writing as required by the [OPM] regulation [5 C.F.R. § 550.111(c)]," and therefore "we hold that plaintiffs were not entitled to compensation under FEPA." A. 1a.

The Court of Appeals acknowledged a long line of binding precedents from the Court of Claims, going back to *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956). A. 12a. Those cases held that FEPA requires payment when federal employees are required by their duties to work overtime or their doing so is approved, and that under FEPA a requirement for orders or approvals to be in writing is invalid insofar as "it restricted the substantive scope of the overtime statute." A. 15a.

Nevertheless, the Court of Appeals held, "the *Anderson* line of cases is inconsistent with" this Court's 1981 *per curiam* decision in *Schweiker* v. *Hansen*, 450 U.S. 785, in which an applicant who had been misadvised by a low-level government employee was not allowed to claim estoppel to obtain Social Security benefits contrary to the applicable statute. The Federal Circuit also relied on this Court's decision rejecting estoppel against the government in *OPM* v. *Richmond*, 496 U.S. 414 (1990), another case in which an applicant forfeited a claim through mistake by a government employee. Petitioners here, however, had specifically empha-

sized that their action was a statutory one under FEPA, and that they made no claim of estoppel (nor had the plaintiffs in the *Anderson* line of cases). See n. 6, *infra*. Nevertheless, the Court of Appeals held that based on *Schweiker* and *Richmond*, "we are compelled to hold that the *Anderson* line of cases is no longer good law . . . ." A. 15a.

The court then addressed "whether OPM's regulation is entitled to *Chevron* deference." A. 17a. The court acknowledged that in FEPA "the term 'order' may refer to either a written or oral direction," and that "[t]he term 'approve' is broad enough to connote an oral or written approval." A. 18a. Nevertheless, the Federal Circuit held, OPM "was empowered to issue regulations setting forth substantive requirements" curtailing the scope of FEPA's statutory entitlement. A. 16a. The court rejected petitioners' argument that OPM's regulation was simply a direction to agencies to record their orders or approvals in writing, not a license to ignore the FEPA entitlement. In so holding, the Court of Appeals gave *Chevron* deference to the OPM regulation *as interpreted by the Justice Department*, and agreed that by denying prior, particularized writings, the Department could escape the overtime pay obligation of FEPA.

Finally, the Federal Circuit rejected *en masse* the abundant record evidence—dozens of exhibits and scores of pages—of written orders or approvals of overtime work issued by Department officials having delegated authority to order or approve overtime. Even writings issued by such officials, it announced, were insufficient under FEPA, because—although neither statute nor regulation nor any order contains such a requirement—they were not "prior" orders or approvals, or did not specify "particular amounts of overtime." A. 26a, 27a. The *United States Attorneys' Manual*'s directive that attorneys "are professionals and should expect to work in excess of regular hours without overtime premium pay" did not count, the Federal Circuit held, because "this statement instructs attorneys not to expect overtime compensation

rather than instructing them to work particular amounts of overtime." A. 26a. Similarly, the fact that the Department kept two contradictory sets of books (one recording overtime, the other not) "may indicate official awareness of the overtime worked, but it does not provide *prior* written authorization or approval of such work." A. 27a (emphasis supplied). A timely petition for rehearing and rehearing *en banc* was denied. A. 29a.

REASONS FOR GRANTING THE WRIT

This is a case whose "importance," the government accurately insisted, "cannot be exaggerated." P. 11, *supra*. The Federal Circuit, overruling prior decisions, has allowed deliberate nullification of an important federal law that affects particularly the hundreds of thousands of executive, administrative or professional employees in the Executive Branch, whose entitlement to overtime pay is governed exclusively by FEPA. A major Executive department of the United States government—ironically, the very department charged with enforcing the laws Congress enacts—set about as a matter of declared policy to defy a federal law, and create its own "professional" exemption from FEPA for attorneys, thereby cheating one group of its hardworking employees of the compensation Congress mandated they be paid, and flouting a longstanding fundamental federal pay statute. Under the Federal Circuit's government-wide holding, FEPA's statutory mandate now has become merely optional, depending on the choice of the employing department or agency. The Department of Justice, according to the Federal Circuit, may demand overtime work and obtain it free.

To overturn the trial court's holding, the Federal Circuit had to misread grossly two of this Court's cases, jettison a dozen of its own cases decided over the past half-century, misapply *Chevron* deference to an interpretation by an agency not responsible for the regulation being interpreted, and bring itself into conflict with several other courts of appeals.

FEPA allows departments and agencies to decide *whether to order or approve* overtime work. But FEPA allows them no discretion as to *whether to pay* for that work once it has been officially ordered or approved. Yet under the holding of the Federal Circuit, any government professional employee now may be required routinely and constantly to work overtime, but may be denied the overtime compensation to which he or she is entitled under FEPA. The Federal Circuit leaves the Attorney General and his subordinates at liberty, as they choose, to ignore FEPA and deny overtime pay simply by not creating prior writings reflecting that particular overtime work is ordered or approved—a complete subversion of the statute.

To escape binding precedent, the Court of Appeals distorted beyond recognition this Court's decisions in *Schweiker* v. *Hansen* and *OPM* v. *Richmond*. Those cases held simply that estoppel does not lie to obtain payment *contrary to* a valid statute or regulation. Here, however, the claim was not one of estoppel, but rather for payment *in accordance with* the statute. The Federal Circuit's radical new reading of those decisions of this Court is both incorrect and contrary to that of at least four other Circuits.

The Federal Circuit then held that the Department's defiance of FEPA is permissible because of an OPM regulation that has never been so construed by OPM, and has been consistently construed to the contrary by the courts for nearly fifty years. The clear import of the OPM regulation was simply an administrative directive *to agencies* to record their overtime orders and approvals in writing—a directive the Department has chosen to disobey.

A more perverse and paradoxical holding of federal administrative law is difficult to conceive. To reach its result, the Court of Appeals was required to abuse *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and it did so in ways that have created circuit conflicts. It declared that the FEPA entitlement is "ambiguous," A. 18a,

even though the court's own analysis of the plain meaning of the statute showed only that the entitlement is broad. It held that FEPA's limited authorization to OPM to issue regulations "necessary for the administration" of FEPA, 5 U.S.C. § 5548, would permit it to issue a "substantive" regulation allowing an agency, at its discretion, to opt out of FEPA. A. 16a. It gave deference to an interpretation at odds with previous court decisions and even with DOJ's own prior positions. Finally, the court gave *Chevron* deference to *DOJ's* interpretation of a regulation issued by different agency—*OPM.*

The Court of Appeals acknowledged that "[o]ur predecessor court [the Court of Claims, more than a dozen of whose decisions it overruled] was *legitimately concerned* that at least in some instances . . . evasion [of FEPA] had occurred and that *the government in effect was coercing uncompensated overtime.*" A. 27a (emphasis supplied). Yet such conscious and systematic coercion and defiance of the compensation guaranteed federal employees by Congress in FEPA is exactly what the undisputed record established, what the Court of Claims had repeatedly denounced—and what the Federal Circuit permitted. The Federal Circuit has rendered an opinion that upsets administrative law, that is contrary to decisions of this Court and of other Circuits, and that allows the Executive Branch by calculated obstruction to frustrate a clear congressional directive enacted in law.[5]

I. THIS COURT'S HOLDINGS IN *SCHWEIKER* AND *RICHMOND* DO NOT AUTHORIZE AN EXECUTIVE DEPARTMENT TO NULLIFY A PAY STATUTE ENACTED BY CONGRESS.

To allow an Executive department through its highest officials to order or approve extensive overtime work as an

---

[5] *Cf. United States* v. *Mead Corp.*, 533 U.S. 218, 226 (2001) (certiorari to Federal Circuit "in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute").

essential part of its attorneys' duties—but then refuse to pay them for it—nullifies Congress's command in FEPA that such work "shall be paid for." 5 U.S.C. § 5542(a). Under the Federal Circuit's decision, FEPA's pay mandate is converted from a statutory command into a matter left entirely to agency choice. By simply refusing to put its orders and approvals in prior writings specifying particular hours, the Court of Appeals holds, the Department can demand unlimited overtime work and obtain it free.

It is remarkable that the Court of Appeals rooted its holding in two decisions of this Court that rejected equitable estoppel against the government. For petitioners throughout this litigation explicitly and unequivocally disavowed any reliance on estoppel to support their overtime pay claims.[6] On the contrary, this is a straightforward Tucker Act claim for pay due under a federal statute. *Cf., e.g., Lyng* v. *Payne*, 476 U.S. 926, 936, 937 (1986) ("respondents have never sought to rely on estoppel as a basis for recovery").

A. *Schweiker* and *Richmond* Do Not Permit Agencies To Escape FEPA by Noncompliance With Regulations.

Schweiker v. *Hansen*, 450 U.S. 785 (1981), and *OPM* v. *Richmond*, 496 U.S. 414 (1990), held that a mistake by a low-level government employee does not bind the government to make a payment *contrary to* a valid statutory or regulatory provision. Thus in *Richmond* this Court emphasized that "[a]ll parties here agree that the award [the plaintiff] seeks would be in direct contravention of the federal statute . . . ."

---

[6] Petitioners told the Court of Appeals that they "do not assert estoppel; nor plead for equity or fairness; nor claim *quantum meruit*." Brief for Appellees, Ct. Apps., at 11-12. They reiterated that they "Do Not Claim Estoppel," and that "The Claims Here Rest on a Statutory Entitlement." *Id.* at 49, 51 (other capitals omitted).

496 U.S. at 424. What the present petitioners bring, however, is a straightforward claim for pay *in accordance with* a congressionally-enacted entitlement *under the plain terms of* a federal statute.

The undisputed facts here, moreover, are poles apart from the isolated errors in advice by subordinate employees in *Schweiker* and *Richmond*. *Schweiker* presented an instance of "the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler* v. *Community Health Services*, 467 U.S. 51, 63 (1984); see *id.* at 62 & n.15. Here, by contrast, the Department's conduct was purposeful policy—not a federal employee's mistake, but a departmental design, considered and directed by officials at the highest level, and beyond the statutory beneficiaries' power to affect.[7] *Schweiker* and *Richmond* do not remotely stand for the proposition that a department may opt as a policy not to comply with a regulation in order to deny statutorily authorized benefits. *Schweiker* and *Richmond* concerned administrative error in applying a valid statute or regulation. This case concerns nullification of a statute.

B. The Decision Conflicts With the Interpretation of *Schweiker* and *Richmond* in Four Other Circuits.

Other Circuits have rejected the Federal Circuit's remarkable construction of *Schweiker* and *Richmond*. They have explained that when, as here, a claimant invokes a statutory right, as contrasted with a claim of equitable estoppel, then *Schweiker* and *Richmond* have no application. Thus earlier this year the Third Circuit tied the estoppel principle of

---

[7] *Cf. Boulez* v. *Commissioner*, 810 F.2d 209, 213 n.32 (D.C. Cir.) ("noncompliance with [a statutory writing requirement] can hardly be reasonably charged to the taxpayer, who is powerless to effect [*sic*] it"), *cert. denied*, 484 U.S. 896 (1987).

Richmond to instances in which "there was no statutory authority" for the relief sought. *Johnson* v. *Guhl*, 357 F.3d 403, 409 (3d Cir. 2004). The D.C. Circuit and Seventh Circuit also, contrary to the Federal Circuit, hold this Court's estoppel decisions inapplicable to claims grounded in a statute. "Although *Schweiker* is terse, the decision appears to turn implicitly on the notion that the applicant's rights were not detrimentally affected by the agency's breach of its own internal rules." *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 584 n.21 (D.C. Cir. 1994), *vacated and remanded on other grounds*, 515 U.S. 1139 (1995); see also *FDIC* v. *Ernst & Young LLP*, 374 F.3d 579, 582 (7th Cir. 2004) (under *Richmond* "[p]romises by the Executive Branch to pay money other than as statutes require do not estop the United States" but "a promise to abide by a federal statute poses no such difficulties."). The Ninth Circuit also has recognized that *Richmond* concerned seeking "to obtain an award that would be contrary to a statute." *Doe* v. *Tenet*, 329 F.3d 1135, 1145 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2908 (2004); *accord, Flick* v. *Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 (9th Cir.), *cert. denied*, 531 U.S. 927 (2000).

II. THE FEDERAL CIRCUIT'S *CHEVRON* DEFERENCE IS CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. *Chevron* Does Not Permit Nullification of FEPA's Statutory Pay Obligations.

Congress expressly provided that whenever overtime is "officially ordered or approved," it "shall be paid for." 5 U.S.C. § 5542(a). "Shall," of course, is a term of mandate, not discretion. *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109 (2002); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). The undisputed record here is that overtime work for Justice Department attorneys was officially both ordered and approved, constantly and repeatedly. The Court of Appeals

acknowledged that "DOJ attorneys were expected to work overtime without compensation." A. 27a.

To uphold the Justice Department's refusal to pay, the Federal Circuit invoked *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the first directive of *Chevron* is that no regulation may supplant the clear command of a statute. "[A] reviewing 'court,- as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000), quoting *Chevron*, 467 U.S. at 842-43. Courts "must reject administrative constructions which are contrary to clear congressional intent." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987), quoting *Chevron*, 467 U.S. at 843 n.9. *Accord, e.g., Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 88, 90 (2002) ("contrary to the Act's design" and "alters the FMLA's cause of action in a fundamental way"); *BATF* v. *FLRA*, 464 U.S. 89, 97 (1983) ("inconsistent with a statutory mandate or . . . frustrate the congressional policy underlying a statute"); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("frustrate the policy that Congress sought to implement"); *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978) (courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions . . . that frustrate the congressional policy underlying a statute") (quotation omitted).

The Federal Circuit, nevertheless, has fundamentally rewritten FEPA by transforming a statutory command into a discretionary invitation. It has endorsed the Department of Justice's position that (a) to satisfy FEPA and the OPM regulation, "prior" detailed writings are required that specify "particular amounts of overtime," A. 26a, 27a; but that (b)—as in *Catch-*

22—such writings will be withheld.[8] By that manipulation, DOJ appropriates for itself discretion not to pay its attorneys for overtime work, while praising them as "professionals," A. 78a, 89a—a category for which, concededly, no exemption from FEPA exists.[9] "What we have here, in reality, is a fundamental revision of the statute," which "[i]t is highly unlikely that Congress would leave . . . to agency discretion." *MCI Telecommunications Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); see also *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("highly implausible"). A federal agency may not—as the Department has done here—adopt a pay policy for itself and go its own way, flouting what was commanded by Congress. "There is no provision in the Constitution that authorizes the President [or the Department of Justice] to enact, to amend, or to repeal statutes." *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998).

FEPA authorized OPM to issue regulations "necessary for the administration" of FEPA. 5 U.S.C. § 5548(a). But OPM was granted no authority to issue a regulation undermining FEPA in such a way. It was not contended that OPM ever gave its regulation this interpretation. The only agency to make this audacious argument is the Justice Department.

---

[8] *Cf. Anderson* v. *United States*, 201 Ct. Cl. 660, 663-64 (1973):

> "[The government], if its interpretation [of FEPA] is correct, has devised a wonderful heads-I-win, tails-you-lose, regulation. . . . We are reluctant to impute to the VA an intent to frustrate the apparent will of Congress that overtime work shall be paid for."

[9] Congress in the Fair Labor Standards Act of 1938 excluded all persons "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). As the government conceded, see p. 2, *supra*, FEPA, enacted only seven years later, contained no such exclusion. The FLSA was made applicable to some federal employees in 1974. 88 Stat. 55, 58, 29 U.S.C. § 203(e)(2)(A); see 5 C.F.R. §§ 550.102(a), 551.203(b), 551.205-207.

B. FEPA and the OPM Regulation Are Not Ambiguous and Had a Settled Interpretation.

1. *FEPA Is Not Ambiguous.*

FEPA could scarcely be clearer. Without exception, the statute inclusively directs compensation for *all* overtime work that is "officially ordered or approved." Indeed, the Court of Appeals, citing dictionaries, acknowledged that this unrestricted statutory terminology included *both* oral and written orders or approvals. A. 18a. Yet the court then proceeded to hold that, because the statutory text plainly *covers both*, it somehow is rendered ambiguous, and one of the alternatives the statute includes may simply be ignored.

To observe that the statutory language covers both oral and written orders or approvals, however, means that the statute is broad and inclusive—not that it is ambiguous. "[A]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (rejecting regulation adding restrictions to statutory benefit). See also, *e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("The regulation in this case, however, is not ambiguous—it is plainly permissive."); *Muscarello* v. *United States*, 524 U.S. 125, 131 (1998) ("'carry' in its ordinary sense includes carrying in a car").[10]

In a further departure from accepted rules of construction, the Federal Circuit injected the absent word "prior" before "approved," to add an additional requirement that is not to be found anywhere in FEPA or the OPM regulation. A. 27a. *Manning* v. *United States*, 10 Cl. Ct. 651, 661 (1986) ("approved" may be either in advance of or after overtime

---

[10] The Court of Appeals cited *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). A. 18a. But that decision concerned a statute that obviously was *not* clear: "it would be difficult indeed to contend that the word 'interest' . . . is unambiguous" with respect to credit-card late fees. 517 U.S. at 739.

work performed). And in still another radical departure from the text and judicial precedent, the Court of Appeals created yet an additional requirement: that orders or approvals to be subject to FEPA must specify "particular amounts of overtime." A. 26a; *but see, e.g., Baylor* v. *United States*, 198 Ct. Cl. 331, 359 (1972) (FEPA requires compensation "even in the absence of a regulation requiring a certain number of minutes of overtime"). These whole-cloth insertions—by the Federal Circuit, not OPM—entail amending the statutory text, not implementing it. It is a court's "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993). "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Other courts of appeals hold that exceptions are not to be read into a broad and unrestricted statutory term. "The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered 'ambiguous' merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Moore* v. *Hannon Food Service, Inc.*, 317 F.3d 489, 497 (5th Cir.), *cert. denied*, 540 U.S. 938 (2003). See also, *e.g.*, *DeGeorge* v. *United States Dist. Court*, 219 F.3d 930, 937 (9th Cir. 2000) ("evidence" is to be interpreted by its "ordinary definition," which is "broad"); *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ("practice" properly interpreted as broad).

2. *An Agency Interpretation in Conflict With Court Interpretations Does Not Receive Deference.*

The Department's interpretation upheld by the Federal Circuit here is contrary to nearly half a century of judicial

interpretations of FEPA. Beginning in 1956 the Court of Claims held that the command of FEPA that overtime be paid when "officially ordered or approved" must be obeyed when officials systematically require employees to work overtime, but intentionally withhold a writing. The court explained:

> "The withholding of written orders or approval reflected *observance of the letter of the regulation but denial of the substance of the statute*."

Anderson v. *United States*, 136 Ct. Cl. 365, 371 (1956) (emphasis supplied). *Byrnes* v. *United States*, 163 Ct. Cl. 167 (1963), held with respect to the predecessor of the OPM regulation that

> "The invocation of departmental regulations requiring specific written authority for overtime *cannot avoid the plain requirements of the statute* for overtime pay when the performance of this overtime is induced by the Government . . . ."

Id. at 174 (emphasis supplied). Likewise, *Adams* v. *United States*, 162 Ct. Cl. 766, 769 (1963), held that "plaintiffs are not prevented from recovering" simply because authorized officials of the Justice Department "withheld issuance of written orders (or approval) which should have been issued in the circumstances." The Department of Justice knowingly chose simply to defy those decisions and many others that followed them.[11] Now the Federal Circuit, inexplicably citing this Court's estoppel cases, has overruled those decisions and, citing *Chevron*, has held that they all were wrongly decided.

---

[11] *E.g.*, *Rapp* v. *United States*, 340 F.2d 635, 640-41 (Ct. Cl. 1964); *Fix* v. *United States*, 368 F.2d 609, 612-13 (Ct. Cl. 1966); *Baylor* v. *United States*, 198 Ct. Cl. 331, 359-60 (1972); *Anderson* v. *United States*, 201 Ct. Cl. 660, 666 (1973); *Bennett* v. *United States*, 4 Cl. Ct. 330, 337 (1984); *Manning* v. *United States*, 10 Cl. Ct. 651, 663-64 (1986); *DeCosta* v. *United States*, 22 Cl. Ct. 165, 176 (1990); *Hannon* v. *United States*, 29 Fed. Cl. 142, 149 (1993); *Buckley* v. *United States*, 51 Fed. Cl. 174, 217-18 (2001); *Crowley* v. *United States*, 53 Fed. Cl. 737, 784 (2002).

An agency interpretation that is contrary to settled judicial interpretation is not entitled to deference. As this Court held in *Neal* v. *United States*, 516 U.S. 284, 295 (1996),

> "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."

See also *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Rejecting half a century of such "settled law," the Federal Circuit simply overruled it, and deferred to one of the agencies subject to FEPA, the Department of Justice.

3. *An Agency's Rejection of Its Prior Interpretations Undermines Deference.*

The Justice Department's misinterpretation of the OPM regulation contradicts not only a half century of court decisions, but a series of opinions within the Justice Department itself. See pp. 7-10, *supra*. In addition, it is contrary to repeated concessions the Department has made in court over the past two decades—indeed, even while this litigation was pending. Soon after *Anderson* the government conceded in the Court of Claims that

> "[t]here can be no question that in the *Byrnes* case, the overtime worked by the plaintiffs therein was ordered from the highest echelons of the Internal Revenue Service, and the overtime performed was acquiesced in by them."[12]

Thereafter the government continued to take the position in court that under FEPA

> "[i]t is not necessary that plaintiffs show that an authorized official expressly ordered the overtime; an

---

[12] Defendant's Brief, *Bilello* v. *United States*, No. 198-63, Ct. Cl., 5 (1965).

'inducement' to perform the work in question would be sufficient."[13]

Again, in 2001, while this case was pending, the government, citing *Anderson* and cases following it, acknowledged that a *de facto* requirement for overtime work "is sufficient to comprise order or approval;" it even initially made the same concession in this case. See pp. 7-8, *supra*.[14] The record also shows that when a former Justice Department attorney sued for overtime pay under FEPA, the Department settled out of court "because it realized that it had no defense." A. 85a. A high Justice Department official summarized the Department's position in 1998: "any time one of our attorneys sues under" FEPA, the Department "negotiates a quick settlement." A. 120a.

This Court has held that when the government adopts an interpretive position in litigation that is contrary to its own interpretation on many previous occasions, including in prior litigation, its new position is not entitled to deference. *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212-13 (1988); see also, *e.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view") (quoting *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981)); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974) ("the BIA's somewhat inconsistent posture belies its present assertion"). That the Department of Justice, in a sort of cognitive dissonance, continued to defy FEPA year after

---

[13] Defendant's Post-Trial Brief, *Bowman* v. *United States*, Nos. 393-82C, etc., Cl. Ct., 4 (1984).

[14] Thus the Federal Circuit was mistaken in assuming that after *Anderson* "the government persistently argued that the OPM regulation did not permit overtime compensation unless an authorized official ordered or approved the overtime work in writing." A. 7a.

year in the face of its own internal opinions and its prior interpretations presented to the courts generates no basis for deference: "consistent infidelity to existing precedent is no virtue." *Professional Airways Systems Specialists* v. *FLRA*, 809 F.2d 855, 860 (D.C. Cir. 1987).

C. Deference Is Not Owed to an Agency's Interpretation of a Statute It Is Not Authorized To Administer, or of Another Agency's Regulation.

The Court of Appeals created another conflict when it accorded *Chevron* deference to the Department of Justice's policy based on a regulation that was not even the Department's own, but rather a regulation issued by a different agency, OPM. The creation of an exclusion from FEPA for attorneys was an artifact entirely of the Department's, applying a statute and regulation it had no authority to interpret.

Contrary to the Federal Circuit's holding here, an agency's interpretation of a statute it is not authorized to administer or interpret, or of another agency's regulation, does not receive *Chevron* deference. Nor does the Department of Justice have expertise in federal pay administration. See, *e.g., Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("practical agency expertise is one of the principal justifications behind *Chevron* deference"). *Chevron* deference is "accorded to an executive department's construction of a statutory scheme *it is entrusted to administer*." 467 U.S. at 844 (emphasis supplied). "[T]he only legitimate claimant to deference with regard to . . . regulations is the agency that drafted them." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 708 (1991).[15] See *Martin* v. *OSHRC*, 499 U.S. 144,

---

[15] See also, *e.g.*, *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003) ("defer to a reasonable construction by the *agency charged with its implementation*") (emphasis supplied); *Meyer* v. *Holley*, 537 U.S. 280, 287-88 (2003) (same); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (same); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (same).

152-53 (1991) (Commission's interpretation of Secretary of Labor's regulations not entitled to *Chevron* deference). The same is no less true under the limited deference standard of *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). FEPA delegated no interpretive or administrative authority to the Department of Justice. Rather, the statute explicitly assigns administrative responsibility to OPM. 5 U.S.C. § 5548(a).

Particularly inappropriately, the Federal Circuit gave deference here to an interpretation by the least authoritative interpreter of all: the Department of Justice. The Department of Justice is not empowered to regulate pay; rather, it is itself in this respect a regulated entity. It is one of the federal departments and agencies which, in accordance with FEPA, OPM administratively regulates, for example, by directing that its orders or authorizations for overtime be memorialized in writing. Deferring to an interpretation announced by a regulated entity would be like deferring to drug manufacturers as to how to interpret a regulation of the Food and Drug Administration, or to corporations issuing publicly-traded securities as to how to interpret the securities laws. Even more ironically, the Federal Circuit's deference here was not to DOJ's *obedience* to the OPM regulation, but rather to the Department's intentional and systematic policy to *violate* it.

Once again, other Circuits are in conflict with the Federal Circuit here. In *Navarro* v. *Pfizer Corp.*, 261 F.3d 90, 99 (1st Cir. 2001), the First Circuit rejected the EEOC's interpretation of a Labor Department regulation. In *Social Security Admin.* v. *FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000), the D.C. Circuit rejected the FLRA's interpretation of an OPM regulation, and explained:

> "We do not defer to the FLRA's interpretation of the Back Pay Act, a general statute not committed to the Authority's administration. . . . Nor do we defer to the FLRA's interpretation of a regulation promulgated by

> another agency, even if the OPM's regulation itself is entitled to deference under *Chevron* . . . . So far does the FLRA distort it that the regulation no longer comports with the statute it interprets." 201 F.3d at 471.

Such distortion of the OPM regulation, a regulation over which it had no authority, was exactly what DOJ committed here.

III. THE FEDERAL CIRCUIT'S DECISION HAS GOVERNMENT-WIDE IMPACT.

The Federal Circuit's holding upsets settled pay practices throughout the Executive Branch. As the government emphasized to the Court of Appeals,

> "In this case, the importance of the question cannot be exaggerated. Not only are there over 9,000 class members in this case, but, in addition, FEPA applies to the entire Federal Government."

Petition of United States, Ct. Apps., at 8. Indeed, FEPA does "appl[y] to the entire Federal Government"—including not only tens of thousands of attorneys in many departments and agencies, but most of the 419,212 professional and 445,478 administrative federal employees[16] who are excluded from the overtime provisions of the Fair Labor Standards Act and whose entitlement to overtime is governed exclusively by FEPA. See n. 9, *supra*.

Until now, many government attorneys in agencies outside the Justice Department have received overtime compensation (usually compensatory time) under FEPA. These include attorneys of the Departments of Agriculture, Energy, Commerce, HHS and Treasury, the IRS, and the FCC, FDIC, NLRB and SEC. C. 1111-14, 1276. A 1995 report to the Attorney General on attorney overtime referred to "diverse practices in other agencies." C. 942. The Federal Circuit acknowledged that its decision here applies to "DOJ and

---

[16] Data from Office of Personnel Management, Office of Workforce Information and Planning (June 2004).

other affected agencies." A. 28a. Until now, the long-settled line of cases beginning with the Court of Claims's 1956 decision in *Anderson* protected those employees government-wide from the kind of deliberate, systematic exploitation forbidden by Congress but practiced by the Justice Department. The present decision overrules all those cases and removes that protection.

This Court long has held that when the government as "an employer . . . issues orders . . . directing the performance of services," then "the statutes create an obligation on the part of the United States to pay to [employees] such sums as they may earn under their provisions." *United States* v. *Myers*, 320 U.S. 561, 567 (1944). A recent Attorney General after praising the "professionalism" of DOJ attorneys exulted that "[t]he Department is a place where we strive constantly to do the right thing." U.S. DEPARTMENT OF JUSTICE, LEGAL ACTIVITIES 1993-1994 iii (1994). For the Justice Department to refuse its thousands of attorneys, who represent the United States in court every day, the pay they are due under a federal statute is a matter of no small moment.

This Court often has recognized the need for plenary review of decisions within the Federal Circuit's exclusive appellate jurisdiction, 28 U.S.C. § 1295(a), when they are of fiscal and administrative importance, or have government-wide impact.[17] In *United States* v. *Hatter*, 532 U.S. 557, 564 (2001), this Court on certiorari to the Federal Circuit considered claims for compensation brought by sixteen federal judges. If pay claims of federal judges merit this Court's

---

[17] *E.g.*, *Mead Corp.* (application of *Chevron* to customs ruling); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 471 (2003) (Indian Tucker Act); *Franconia Associates* v. *United States*, 536 U.S. 129, 138-40 (2002) (Tucker Act); *USPS* v. *Gregory*, 534 U.S. 1 (2001) (review of MSPB); *United States* v. *Hatter*, 532 U.S. 557 (2001) (Tucker Act); *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 385 (1999) (whether "to analyze the [customs] regulation under *Chevron*").

review, surely no less so do claims of Department of Justice attorneys, who likewise are indispensable to the system of federal justice.

The Federal Circuit appended to its opinion a "wish" that its decision not be "seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation." A. 27a. But such evasion is *exactly* what the Federal Circuit upheld, and *exactly* what its opinion condones for the future. It is foreseeable that other federal agencies henceforth may adopt DOJ's example of demanding overtime work while purposefully withholding the prior detailed written orders or approvals whose absence the Federal Circuit holds will automatically block the overtime compensation Congress mandated in FEPA.[18]

CONCLUSION

For the reasons stated, certiorari should be granted.

---

[18] The Court of Appeals mistakenly observed that "Congress enacted legislation in 1999 that prohibited overtime compensation for DOJ attorneys after November 29, 1999." A. 28a n.9; see also A. 2a n.1. That provision in an omnibus annual appropriations act did not alter or amend the continuing FEPA entitlement to overtime compensation in 5 U.S.C. § 5542(a) (which may be by compensatory time off rather than money, 5 U.S.C. § 5543), and did not affect the thousands of government attorneys outside the Department of Justice, or other federal professional or administrative employees who currently receive overtime pay or compensatory time under FEPA. See 113 Stat. 1501, 1501A-21 (1999); see also 114 Stat. 2762, 2762A-68 (2000).

Respectfully submitted,

Of Counsel:

PAUL Y. KIYONAGA
DEBRA L. SOLTIS

KIYONAGA & SOLTIS, P.C.
910 17th Street, N.W.
Washington, D.C. 20006
(202) 363-2776

BRENDAN V. SULLIVAN, JR.
JOHN G. KESTER *
ROBERT A. VAN KIRK
DANIEL D. WILLIAMS

WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioners

November 29, 2004

* Counsel of Record